No. 1808

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

IN ADMIRALTY.

ANDREW ANDERSON, A. ANDERSON COMPANY (a corporation), JOHN J. BEATON, ANGUS BEATON, EDWARD CARLSEN, HARRY F. CHASE, MALCOLM P. CHASE, L. CHASE, SAMUEL B. CHASE, MARY L. CHASE, WM. B. CHASE, JR., DOROTHY M. CHASE, FRED J. CHASE, GEORGE BOOLE (a corporation), MRS. E. G. BOOLE, HENRIETTA W. HOBBS, E. W. HOBBS, CLARENCE W. HOBBS, EDWARD HENRIX, MARGARET J. WALL, MARION B. WALDRON and HENRY NELSON, Libelants,

Appellants,

vs.

J. J. MOORE & COMPANY (a corporation),

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

WILLIAM DENMAN,
Proctor for Appellee.

Filed this.....day of April, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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APPELLEE'S SUPPLEMENTAL BRIEF.

On March 31, 1910, some time subsequent to the argument of this cause, a decision of the Circuit Court of Appeals, *In re Cargo of 3408 tons of Pocahontas Coal,*

175 Fed. 548, appeared in the Federal Reporter. This case reaffirms the principles of the decisions in *Evans v. Blair,* 114 Fed. 616, and *W. K. Niver Coal Co. v. Cheronea Steamship Co.,* 142 Fed. 402, upon both of which we relied in our argument and brief. In this latest case, Judge Putnam clearly lays down the following propositions:

1. That the charterer has the right to designate the wharf at which the vessel shall discharge, even where no specific authorization to designate is given in the charter.

2. That the designation of a crowded dock is justified by the fact that the coals in question were ultimately to be delivered by the consignee at a factory on the line of the railway terminating on the said docks, regardless of whether other discharging places may be ready to receive the cargo; just as in this case the coals were to be delivered by the consignee, J. J. Moore & Company, to the Western Fuel Company, whose bunkers were designated by Mr. Moore on the "Columbia's" arrival.

3. That it is a sufficient designation to name generally the docks of a railway company (just as Mr. Moore designated the docks of the Western Fuel Company), leaving to that company the designation of the specific berth in which the vessel is to lie (175 Fed. 549).

4. That the charterer so designating the dock is not liable if there is a delay in discharging the vessel, through the management of the dock in its customary

way, even though due to a preference of certain classes of vessels arriving after the vessel in question. The appellate court sustains the lower court in excusing the charterer where the delay was caused by the preference given to transoceanic liners which came regularly to the dock and reversed it for holding that the charterer was chargeable for a delay due to a preference given colliers carrying coals to the railway company.

In re Cargo of 3408 tons Pocahontas Coal, 175 Fed. 548, sustaining in part and reversing in part *Ross v. Cargo of Coal,* 165 Fed. 722.

5. That vessels of small capacity, quickly discharged, may be admitted ahead of prior arrived larger vessels if such be a reasonable usage; just as here the "Lunsmann" was permitted to discharge a few tons on a *holiday* to lighten her to go to Oakland Creek.

175 Fed. 554.

Another Circuit Court of Appeals decision relied upon by us at the argument and in our brief was *Pyman SS. Co. v. Mexican Central Ry.,* 169 Fed. 281, where the delay was due to the arbitrary action of the owner of the dock, and it was held that the charterer was not liable. The United States Supreme Court refused certiorari in this case, as reported in 30 Supreme Court Reporter 399.

The above cases seem to dispose entirely of our opponent's contention that the practice of a particular company causing delay at its docks places the blame on the charterer for the failure of the vessel to reach her discharging place. In this connection there is apparently

a failure on the part of the appellant to appreciate that the burden of proof lies upon the vessel and not upon the charterer. When the vessel arrives in port, the following is the order in which the parties to the charter must act: 1. The vessel must notify the charterer that the ship is in port; 2. The charterer must designate a discharging place; 3. The vessel must sail to the discharging place; 4. The vessel must notify the charterer that she is ready to discharge her cargo; 5. The charterer must receive his cargo.

Now it is apparent that the libelant cannot show a breach of contract until it has maintained its burden of proof as to its conditions precedent. The lower court finding on conflicting evidence, that the charterer did designate in proper time a customary place for discharge, to wit, the Western Fuel bunkers, *the burden of proof is then upon the vessel to show* either (a) that she proceeded at once to the bunkers, which it is admitted she did not do, or (b) *that she was prevented by the charterer from reaching the bunkers designated.*

All the testimony as to the prevention of performance by the ship of her condition precedent to sail to the designated bunkers must be viewed from the standpoint of the ship's burden of proof.

If she regarded as untrue Mr. Moore's statement that at the time he designated the Western Fuel bunkers *all* the bunkers in San Francisco were crowded and weeks behind, then she should have produced evidence to rebut his testimony.

If she wished to show that she was prevented by importations of Australian coal by Mr. Moore in excess of the reasonable demand of a year previous (when he placed his orders*) it was her duty to show that his importation was in excess of the reasonably expected demand and that this was the proximate cause of the delay. As the evidence stands, it shows merely that there was more Australian coal ordered by *all* persons than theretofore, and not that *J. J. Moore & Company* ordered more than was its custom, or more than seemed a reasonable amount when it placed its orders. Even if the amount imported was in excess of the prior demand, there is nothing to show that the entire glut was not caused by the importation of other persons. Certainly she has not maintained her burden of proof that Mr. Moore's importations were the proximate cause of the impediments which prevented her reaching the designated dock.

Mr. Moore testified that all his cargoes were sold before arrival and hence, that there was an existing demand for all *his* coal at least, and that he had no power to remove the coal lying at any dock as it was then the property of another person. If *the vessel knew this testimony was untrue* it was for her to show it by a pre-

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* Counsel's reply brief speaks as if it were a matter of significance "that there was another contract" for coal for one of the many vessels described in the evidence. They evidently overlooked the testimony that all the coal in question was ordered a year prior to the congestion. Mills, page 84. It is therefore immaterial how many contracts there were unless the aggregate be shown excessive for the demand then existing.

ponderance of evidence, either on cross-examination or through further witnesses. It is significant that the appellant nowhere replies to this contention of our brief.

On all the points above referred to, we are confident that the evidence affirmatively shows these various facts as sufficient reasons why J. J. Moore & Company's acts cannot be considered the proximate cause of the delay, and hence establish an affirmative defense under another clause of the charter excepting delays beyond the charterer's control. *A fortiori* then, has the vessel failed to sustain its burden arising under the delivery clause of the charter to show a prevention by the charterer of the performance of her necessary condition precedent, namely, that she sailed promptly to the designated wharf.

Counsel in their brief seem to think that because in this case the owner of the vessel loses more by the delay than the owner of the coal, the court must interpret against the charterer the clause providing that the vessel shall be in berth and notice of her readiness served before the lay days begin to run. Suppose the cargo in question had been, as not infrequently happens, of far greater value than the vessel, and that the charterer lost more by being deprived of its possession during the delay than the vessel owner, would the court give this customary clause—in a great number of modern charters—a different interpretation? Do the words "ready to discharge" mean one thing when a certain amount of damage is done and another when another amount? Is it the *quantum* of damage that determines the interpretation of the contract?

The significant thing is that both the charterer and the owner are damaged by the delay, the one having his cargo kept from him and the other his vessel. It is a reasonable interpretation of such an instrument as that at bar, in the absence of a specific agreement by the one or the other to find a ready dock, that where both parties are innocent the loss due to delay from overcrowding in the port should rest where it falls, i. e., on the shoulders of each.

Respectfully submitted,

William Denman,

Proctor for Appellee.